

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANDY ACE WEIMER,

Plaintiff,

v.

SHERIFF DEPARTMENT CITY
SPOKANE WA; BADGE #592051
STOLZ,

Defendants.

NO. 2:23-CV-0045-TOR

ORDER GRANTING MOTION TO
DISMISS

BEFORE THE COURT are Plaintiff's Request for Entry of Default (ECF No. 4), Defendants' Motion to Dismiss Per FRCP 12(b)(2), (5), and (7) (ECF No. 6), and Plaintiff's Request for Entry of Default (ECF No. 10). These matters were submitted for consideration without oral argument. The Court has reviewed the record and files herein, the completed briefing, and is fully informed. For the reasons discussed below, Plaintiff's Request for Entry of Default (ECF No. 4) is **denied**, Defendants' Motion to Dismiss Per FRCP 12(b)(2), (5), and (7) (ECF No. 6) is **granted**, and Plaintiff's Request for Entry of Default (ECF No. 10) is **denied**.

BACKGROUND

On February 16, 2023, Plaintiff, proceeding pro se, filed a Complaint alleging “Eighth Amendment ... nor cruel, and unusual punishments inflicted.” ECF No. 1 at 3. That same day, Plaintiff filed a service of summons on “Badge #592051 Stolz” for “Sheriff Department City Spokane WA.” ECF No. 3 at 1.

On March 31, 2023, Plaintiff filed a Request for Entry of Default, alleging “Defendant did not plead or defend within the 21 day deadline” and sought \$700,000 in damages and the termination of Deputy Stolz from law enforcement. ECF No. 4. On April 14, 2023, Defendants filed the Motion to Dismiss for failure to properly effectuate service and name proper parties. ECF No. 6. Plaintiff did not respond to the Motion to Dismiss.

On May 3, 2023, Plaintiff again filed a Request for Entry of Default with a mail receipt addressed to “Spokane County Prosecutor.” *See* ECF No. 10. Defendants filed a response to this request. ECF No. 11.

DISCUSSION

I. Motions for Entry of Default

Plaintiff contends an entry of default against Defendants is appropriate where they failed to respond to the Complaint by the time specified under the Federal Rules of Civil Procedure. As Defendants responded with a motion to dismiss based on failure to effect proper service, Plaintiff’s motions are moot. In

1 any event, Plaintiff failed to comply with Federal Rule of Civil Procedure 55.

2 Plaintiff's motions are denied.

3 **II. Motion to Dismiss**

4 Defendants move to dismiss the Complaint for improper service and an
5 improper party. ECF No. 6. Plaintiff did not respond to Defendants' motion.

6 A court has jurisdiction over a defendant only where a defendant is properly
7 served under Federal Rule of Civil Procedure 4. *Direct Mail Specialists, Inc. v.*
8 *Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). A defendant
9 may challenge the service of process made by a plaintiff. Fed. R. Civ. P. 12(b)(5).
10 Once challenged, the plaintiff has the burden to establish that service of process
11 was valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).
12 While liberally construed, a plaintiff must demonstrate substantial compliance with
13 Rule 4. *Direct Mail Specialists*, 840 F.2d at 688.

14 As relevant here, a person may be served by either “following state law for
15 serving a summons in an action brought in courts of general jurisdiction ... [or]
16 delivering a copy of the summons and of the complaint to the individual personally
17 ... or delivering a copy of each to an agent authorized or by law to receive service
18 of process.” Fed. R. Civ. P. 4(e). A local government entity may be served by
19 either “delivering a copy of the summons and of the complaint to its chief
20 executive officer” or “serving a copy of each in the manner prescribed by that

1 state's law for serving a summons or like process on such a defendant." Fed. R.
2 Civ. P. 4(j).

3 First, there is no evidence Plaintiff substantially complied in properly
4 serving the "Spokane Sheriff Department City Spokane WA", presumably the
5 Spokane County Sheriff's Department. Fed. R. Civ. P. 4(j); RCW 4.28.080(2). In
6 any event, Spokane County is the proper party as the legal entity to be sued. Fed.
7 R. Civ. P. 12(b)(7); RCW 36.01.010. Therefore, the Court dismisses the action
8 against the "Sheriff's Department City Spokane WA" with prejudice.

9 Second, Plaintiff contends he served a summons on "Badge # 592051 Stolz"
10 for "Sheriff Department City Spokane WA." It is not clear whether Deputy Stolz
11 is an individually named defendant for personal service. In any event, Deputy
12 Stolz declaration states that he has never been served a copy of the Complaint and
13 summons for this case. *See* ECF No. 8. Plaintiff failed to respond to this assertion
14 and failed to carry his burden that proper service has been accomplished.

15 Moreover, Plaintiff's claim against Deputy Stolz for a traffic stop fails on its face
16 where the Eighth Amendment right to be free from cruel and unusual punishment
17 attaches after a conviction and sentencing. *Graham v. Connors*, 490 U.S. 386, 392
18 n.6 (1989); *Pierce v. Multnomah Cnty., Or.*, 76 F.3d 1032, 1042 (9th Cir. 1996).
19 Therefore, the Court dismisses the action against Deputy Stolz without prejudice.

20 //

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 2 1. Plaintiff's Request for Entry of Default (ECF No. 4) is **DENIED**.
- 3 2. Defendants' Motion to Dismiss Per FRCP 12(b)(2), (5), and (7) (ECF
- 4 No. 6) is **GRANTED**.
- 5 3. Plaintiff's Request for Entry of Default (ECF No. 10) is **DENIED**.
- 6 4. Plaintiff's Complaint against Defendant Sheriff Department City
- 7 Spokane WA is **DISMISSED with prejudice**.
- 8 5. Plaintiff's Complaint against Defendant Stolz Badge #592051 is
- 9 **DISMISSED without prejudice**.

10 The District Court Executive is directed to enter this Order and Judgment,

11 furnish copies to to the parties, and **CLOSE** the file.

12 DATED June 5, 2023.



15

16

17

18

19

20

Thomas O. Rice
THOMAS O. RICE
United States District Judge